Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Sponsorship Identification Rules and Embedded Advertising	)	MB Docket No. 08-90
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REPLY COMMENTS OF CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD

Claire Magee
Deanna Pisoni
Elizabeth Serio

Law Students
Georgetown University Law Center

Victoria F. Phillips, Esq.
Coriell Wright, Esq.
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9535

Counsel for Campaign for a Commercial-Free Childhood

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SUMMARY

Campaign for a Commercial Free Childhood ("CCFC") respectfully submits these reply comments in the Commission's proceeding regarding the use of embedded advertising and effectiveness of sponsorship identification rules. CCFC urges the FCC to codify its existing prohibition on the use of embedded advertising in all children's programming. This proposal enjoys widespread support among commenters, and the FCC should promptly adopt a ban applicable to children's programming provided on broadcast, satellite, and cable television. Additionally, because children watch a significant amount of programming that falls outside of the narrow definition of children's programming, CCFC encourages the FCC to protect children from misleading embedded advertising techniques by limiting their use during those hours of primetime broadcast programming when children are likely to be in the audience.

Industry commenters oppose any additional regulation of the use of embedded advertisements and claim that such techniques are necessary to sustain advertising revenues because technological advances, such as digital video recorders (DVRs), have rendered traditional commercials obsolete. These claims are overstated and conflict with evidence suggesting that DVR use actually enhances viewership of programming and traditional commercials. Instead, networks and advertisers favor these stealthy techniques because they are more psychologically-effective than traditional advertising methods. However, even if industry's claims were credible, they should not justify the use of advertising techniques that are misleading, particularly when viewed by children.

Embedded advertising is misleading because it seeks to surreptitiously influence viewers by obscuring the existence of the commercial message and avoiding the skepticism and other cognitive defenses that people employ when they are consciously confronted with an

advertisement. Embedded advertising is even more misleading for children because it exacerbates children's inability to distinguish between commercial and non-commercial messages and to understand that commercial messages are biased. Although sponsorship disclosure may counteract the misleading nature of embedded advertisements for adults, disclosure cannot remedy the misleading nature of embedded advertising for children, who can often neither read disclosure statements, nor understand their significance.

Under Supreme Court precedent, misleading commercial speech is not constitutionally protected. Thus, because it is misleading, embedded advertising is not entitled to any First Amendment protection. However, even assuming that embedded advertising is not inherently misleading, increased regulation of embedded advertising would be subject to only intermediate scrutiny under the commercial speech doctrine. Consequently, a limited restriction on the use of embedded advertising during primetime broadcast programming, like the one proposed by CCFC, would be constitutional because it presents a limited and direct means of furthering the government's substantial interest in protecting children from unfair and unnecessary commercial manipulation.

CCFC's proposal directly advances the government's interest in protecting children from commercial manipulation and in preventing the airwaves from being used as conduits for stealth advertising. The restriction is narrowly tailored because it only applies to sponsorship arrangements that trigger sponsorship identification under the current rules, and would not disturb creative decisions regarding unsponsored use of brands. Nor does the proposal interfere with the use of traditional interstitial spots or limit the use of embedded advertisements in general audience programming aired during the vast remaining portion of the day. Accordingly, such a limited measure, if adopted by the FCC, would be constitutionally permissible.

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Campaign for a Commercial-Free Childhood by its attorneys, the Institute for Public Representation, respectfully submits these reply comments in the Commission's proceeding regarding the use of embedded advertising and effectiveness of sponsorship identification rules.

CCFC is concerned about the manipulative effects embedded advertising has on children, whose unique vulnerabilities render them susceptible to commercial exploitation. Consequently, CCFC asks the Commission to codify existing prohibitions against embedded advertising in children's cable, satellite, and broadcast programming. Additionally, CCFC asks the Commission to limit embedded advertising during the hours of broadcast primetime programming when children are likely to be in the audience. CCFC strongly believes that these restrictions are necessary to ensure that children are not unfairly taken advantage of by manipulative advertising techniques.

I. The Harms To Children From Embedded Advertising Outweigh The Alleged Needs Of Industry

Industry commenters are for the most part unified in their resistance to any increased regulation of embedded advertising and argue that the technique is necessary because new media

technologies increasingly enable viewers to avoid traditional commercials.[1] Moreover, they maintain that embedded advertising is not harmful to the public.[2] While CCFC recognizes that innovations in technology such as the DVR and increased competition have certainly changed the media marketplace, it does not inevitably follow that these developments jeopardize advertising as we know it, or threaten industry bottom lines. Even if such claims were credible, they should not justify the use of advertising techniques that are misleading, particularly when viewed by children.

A. Embedded Advertising Techniques Are Not Necessary To Sustain The Provision Of Television Programming

Industry commenters argue that embedded advertising is necessary to sustain television advertising revenues because fewer viewers are watching traditional advertising.[3] The National Association of Broadcasters (NAB) defends the technique noting that, "technological advances such as the digital video recorder (DVR) and competition from a multitude of video sources have forced advertiser-supported broadcasters to think creatively about new ways to provide value to advertisers."[4] The NAB also argues that "'the TiVo effect' has required programmers and stations to address legitimate demands from advertisers that are growing increasingly concerned that the classic 30-second television spot is being skipped by viewers."[5] Similarly, many of the major content and advertising companies, filing jointly as the National Media Providers, observe

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[1] *See, e.g.*, *Comments of National Media Providers*, filed MB Docket 08-90 (Sept. 22, 2008) ("Media Providers") and *Comments of the National Association of Broadcasters*, filed MB Docket 08-90 (Sept. 22, 2008) ("NAB").

[2] *NAB* at 8.

[3] *See NAB* at 19; *Media Providers* at 12-13.

[4] *NAB* at 20.

[5] *NAB* at 19 (quoting Wayne Friedman, *NBC's Graboff: Mo' Better Branding*, MEDIA DAILY NEWS, June 11, 2007, www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=62104).

that the "penetration of DVRs is increasing, as is the phenomenon of ad skipping facilitated by the DVR."[6] These claims are not only overstated, they are at odds with the results of a study commissioned by the broadcast networks themselves,[7] as well as the admissions of network executives who claim that the issue of "commercial skipping has been overblown."[8] Indeed, one prominent marketing analyst recently noted, "we do not believe that DVRs are the end of TV advertising as we know it. Rather, DVR usage will slowly change the nature of TV viewing for some people, some of the time."[9]

Recent studies show that only 6% of television programming is viewed via DVR.[10] The vast majority of television viewers still watches programs in real time and is fully exposed to traditional commercial spots.[11] Most DVR owners watch at least half of their shows live, and therefore are exposed to all associated commercial spots.[12] Moreover, according to Nielsen surveys, DVR owners "are not fast-forwarding and time-shifting as much as advertisers feared."[13] When DVR viewers watch recorded shows later on, many still watch, on average, two-thirds of the commercials aired during the program.[14]

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[6] *Media Providers* at 13.
[7] Wayne Friedman, *Nets' Study Finds Little Difference In Ad Recall Among DVR Owners*, MEDIA DAILY NEWS, April 7, 2006, www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=41938.
[8] Louise Story, *Viewers Fast-forwarding Past Ads? Not Always*, N.Y. TIMES, February 16, 2007, *available at* www.nytimes.com/2007/02/16/business/16commercials.html?_r=1&emc=eta1&oref=slogin.
[9] NIGEL HOLLIS, MILLWARD BROWN, WHO'S AFRAID OF THE BIG BAD DVR?, *available at* www.millwardbrown.com/Sites/MillwardBrown/Media/Pdfs/en/POV/A947CD58.pdf
[10] Story, *supra* note 8.
[11] Jack Loechner, *DVR Ownership Increases, But Recordings Not Priority Viewing*, CENTER FOR MEDIA RESEARCH, October 1, 2008, www.mediapost.com/blogs/research_brief/?p=1804.
[12] Story, *supra* note 8.
[13] *Id.*
[14] *Id.*

Even when viewers do skip past commercials, a study sponsored by the four major broadcast networks found that ad recall and ad recognition are virtually the same among DVR and non-DVR owners.[15] The study revealed that ad recall and retention was at a 90 index, not one half or one quarter the normal retention rate as previously thought.[16] Interestingly enough, the study showed that DVR-owners had a slightly higher recall level of certain types of advertising, such as movie trailers, than non-DVR owners.[17] As one network executive explained, "[t]here is [an] amount of attentiveness that is required for fast forwarding, and because many ads run frequently, viewers are generally familiar with those commercials."[18]

Not only is the economic harm stemming from DVR use exaggerated by the industry commenters, it is likely that the ability to time-shift programming actually increases the audience of those viewing commercials. DVR technology allows viewers to watch programs that they would otherwise miss. One network executive reported that "top shows are getting five percent more audience. DVRs actually enhance viewership, and now we see there is some commercial value."[19]

Indeed, time-shifting is not a new phenomenon, and in the past its effects have been found to be a benefit to broadcasters. Over two decades ago, the Supreme Court discussed time-shifting with regard to the Betamax recorder, which like the DVR, allowed viewers to time-shift their viewing and potentially fast-forward through commercials.[20] Although the case addressed whether using time-shifting technology to record programs for home viewing constituted copyright infringement, both the District Court and the U.S. Supreme Court discussed the media

[15] Friedman, *supra* note 7.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

industry's claims that time-shifting technology threatened revenues. In the trial below, the District Court found no evidence that using the Betamax recorder decreased television viewership.[21] In fact, 81.9% of interviewees watched the same amount or more of television in "real-time" as they did before owning a Betamax.[22] The District Court also rejected the suggestion that the attractiveness of television broadcasts would be diminished to advertisers because Betamax owners would fast-forward to avoid viewing advertisements.[23] On review, the Supreme Court reaffirmed this observation, noting that "there are many important producers of national and local television programs who find nothing objectionable about the enlargement in the size of the television audience that results from the practice of time-shifting for private home use."[24]

Contrary to media industry arguments made at the time, the Betamax did not have the ruinous effects on advertising that the media companies claimed it would. Today, media providers and advertisers are re-airing these same arguments in an attempt to justify their increasing use of embedded advertising techniques.[25] However, like the Betamax, the DVR has not rendered traditional television advertising spots irrelevant, but instead has enhanced the audience for television programming, as well as for traditional interstitial commercials.

B. Embedded Advertising Techniques Are Misleading To The Public, And To Children In Particular

While the industry comments exaggerate the economic harms to justify the increasing use of embedded advertising techniques, they also downplay the harms to viewers. Indeed, the

[21] *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 429, 439 (C.D. Cal. 1979).
[22] *Id*.
[23] *Id*.
[24] *Sony*, 464 U.S. at 446.
[25] *See NAB* at 19; *Media Providers* at 12-13.

harms caused by these techniques to viewers, especially to children, are very real. Research confirms that, although the misleading nature of embedded advertising can have harmful effects on all viewers,[26] children are especially vulnerable to the manipulative effects of the technique. As CCFC noted in its initial comments, and as the FCC has acknowledged, children are cognitively unable to distinguish between advertising and programming content, and cannot discern persuasive intent.[27]

It is well documented that programmers and advertisers have come to favor the stealthy techniques of product placement and integration because they have proven more effective than traditional advertising methods. As one marketing executive commented, "going forward, proper product placement will be more effective because it won't feel like you're being marketed to."[28] Advertisers favor embedded advertisements because such techniques target viewers without their knowing they are being exposed to a persuasive message, and as a result, circumvent viewers' natural skeptical impulses. Unfortunately, the desired goal of obscuring the existence of the commercial message is ultimately what makes the resulting advertisement misleading.

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[26] *See* C. Janiszewski, *Pre Attentive Mere Exposure Effects*, 20 J. CONSUMER RES. 376 (1993); *See also* R.F. Bornstein, D.R. Leone & D.J. Galley, *The Generalizability of Subliminal Exposure Effects: Influence of Stimuli Perceived Without Awareness of Social Behavior*, 53 J. PERSONALITY & SOC. PSYCHOL. 1070 (1987) (suggesting that young adults exposed to objects presented for a very short duration show a preference for those items, even when they are not aware that they have seen them).

[27] *Comments of Campaign for a Commercial Free-Childhood*, filed MB Docket 08-90 (Sept. 22, 2008), at 9-12 ("CCFC"); *See, e.g.,* H.R. REP. 101-385, at 6 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 1605 ("House Report"); Sandra L. Calvert, *Children as Consumers: Advertising and Marketing*, 18 THE FUTURE OF CHILDREN 205 (2008).

[28] Nick Lico and Mary Connelly, *Quick to Experiment, GM Seeks to Make New-Media Dialogue Pay*, ADVERTISING AGE, Sept.15, 2008, at C34.

While there is significant evidence demonstrating that undisclosed embedded advertising is misleading to adults,[29] the evidence is overwhelming where children are concerned. Numerous empirical studies indicate that the ability to recognize persuasive intent does not develop in most children until the age of eight.[30] Even at this age, that cognitive skill is slow to develop; children may recognize that commercials intend to sell, but may still not understand that commercials are biased messages warranting a degree of skepticism.[31] While all advertising attempts to shape children's perceptions and preferences,[32] embedded advertising poses even greater dangers. By virtue of its integration into programming, children are provided with few or no cues that the messages should be viewed with skepticism. Embedded advertising techniques take advantage of children's vulnerability to commercial persuasion by targeting them in the

[29] Studies show that even adult viewers respond to embedded products without consciously knowing that they are doing so. For example, just seeing a brand may result in consumers having a more favorable attitude towards it even if the consumer does not actually recall the exposure. Janiszewski, *supra* note 26; *See also* S. Law & K.A. Braun, *I'll Have What She's Having: Gauging the Impact of Product Placements on Viewers*, 17 PSYCHOL. & MARKETING 1059 (2000); *See also* Bornstein et al., *supra* note 26 (suggesting that young adults exposed to objects presented for a very short duration tend to show a preference for those same items, even if they are not aware that they have seen them).

[30] Report of the Task Force of the American Psychological Association, *Psychological Issues in the Increasing Commercialization of Children*, at 9, *available at* www.apa.org/releases/childrenads.html.

[31] *Id*.

[32] A recent study demonstrates the powerful influence advertising has on children's decisions even at a very young age. Children ages three to five were given two identical samples of food on a tray, one in McDonald's wrappers and the other in plain, unmarked packaging. When asked whether they tasted the same or whether one was better, the McDonald's-labeled samples were the clear favorites. The study's author said the children's perception of taste was "physically altered by the branding." Thomas N. Robinson, *Effects of Fast Food Branding on Young Children's Taste Preferences*, 161 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 792-97 (2007). This example demonstrates how advertising establishes brand loyalty by taking advantage of children's special susceptibility to persuasion. Similarly, embedded advertising techniques seek to build brand loyalty early in life, but do so by taking advantage of children's cognitive vulnerabilities and naïveté.

context of their favorite programs, when they are so swayed by characters and stories that they are less likely to recognize the biased nature of the marketing messages.

Because of children's inability to recognize persuasion, "it is virtually inconceivable that, even if they recognize product placement as a type of advertising, they would understand that product placement is a form of advertisement intended to promote a product or brand."[33] Indeed, researchers have questioned the "ethical implications for the use of product placement…targeted at young children who have not yet acquired strategic processing skills. Without being aware of their exposure to commercial messages, they have been affected by the exposure in some preconscious way."[34] Accordingly, this stealthy, misleading aspect of embedded advertising poses a deeper threat to children than traditional advertising practices.

As CCFC explained in its earlier comments, the greatest harm of embedded advertising is its unfair manipulation of children's behaviors, beliefs, and decisions.[35] When children view products in the context of programming, they develop strong product and brand preferences without exercising their power of rational decision making.[36] In the words of the Supreme Court, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[37] By embedding advertising in programs, advertisers and media companies are denying children the opportunity to use and

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[33] Angela Campbell, *Restricting The Marketing of Junk Food To Children By Product Placement and Host Selling*, 39 LOY. L.A. L. REV. 447, 481 (2006).
[34] Auty & Lewis, *Exploring Children's Choice: The Reminder Effect of Product Placement*, 21 PSYCHOL. & MARKETING 697, 710 (2004).
[35] *CCFC* at 10-12.
[36] *Id*. (citing Auty & Lewis, *supra* note 34 (finding that children who viewed a clip featuring movie characters using Pepsi products, and who were subsequently offered a choice of soft-drinks, were more likely to choose a Pepsi than children that watched a similar clip with no use of Pepsi-branded products)).
[37] *Prince v. Massachusetts*, 321 U.S. 158, 168 (1943).

hone their decision making skills – skills integral to their development into well-rounded, analytical adults.

For these reasons, CCFC also supports the comments of the Marin Institute[38] and the Center for Science in the Public Interest (CSPI),[39] highlighting the dangerous effects of embedding harmful products such as tobacco and alcohol into television programming. Much like the stealthy practice of embedded advertising, Big Tobacco has used youth-focused marketing campaigns to reel children into smoking when they are very young to ensure a new generation of smokers.[40] CCFC shares the Marin Institute and the CSPI's concerns regarding placement of harmful products in television programs. However, because embedded advertising subverts rational choices, and misleads children by exploiting their cognitive vulnerabilities, CCFC believes that this very practice is cause for concern, regardless of the type of product being embedded.

II. The Commission Should Promptly Codify Its Existing Prohibition On The Use of Embedded Advertising Techniques In Children's Programming

CCFC supports the Commission's proposal to explicitly prohibit the use of embedded advertising in children's programming, and encourages prompt adoption of such a regulation for all children's programming whether provided via broadcast, cable, or satellite service.[41] CCFC is gratified that this specific prohibition enjoys widespread support among commenters in this

[38] *See Comments of the Marin Institute*, filed MB docket 08-90 (Sept. 22, 2008).
[39] *See Comments of the Center for Science in the Public Interest*, filed MB docket 08-90 (Sept. 22, 2008).
[40] "From the 1950s to the present, different [tobacco companies], at different times and using different methods, have intentionally marketed to young people under the age of twenty-one in order to recruit 'replacement smokers' to ensure the economic future of the tobacco industry." *U.S. v. Philip Morris USA, Inc*., 449 F. Supp. 2d 1, 561 (D. D.C. 2006). A former U.S. tobacco sales representative said, "Cherry Skoal is for somebody who likes the taste of candy, if you know what I'm saying." Alex M. Freedman, *Juiced Up: How a Tobacco Giant Doctors Snuff Brands to Boost Their 'Kick,'* WALL STREET JOURNAL, October 26, 1994, at A1.
[41] *Notice* at ¶ 16.

proceeding, and moreover, that no parties have opposed such a prohibition.[42] Indeed, the NAB itself acknowledged that "there would be no harm in providing clarification that makes the existing prohibition explicit."[43] If there is one thing that children's advocates and the media industry should agree on, it is that neither product placement nor product integration has any place in programming designed specifically for children. We encourage the Commission to codify its longstanding policies prohibiting such practices without delay.

III. The Commission Should Also Limit The Use Of Embedded Advertising Techniques During The Hours Of Broadcast Primetime When Children Are Likely To Be In The Audience

While the FCC should promptly codify a prohibition of embedded advertisements in all children's programming, children will not be adequately protected by this measure alone. As CCFC pointed out in its initial comments, children do not only watch shows that fall under the narrow definition of "children's programming."[44] General audience programs, particularly those aired during broadcast primetime, have become immensely popular with young audiences, and are laden with embedded advertising. For example, two million children ages two to eleven regularly watch *American Idol*,[45] which aired 545 minutes of embedded advertisements (the vast majority for Coca-Cola products) in the 2008 season – an average of fourteen minutes of product integration and placements per hour-long episode – in addition to the traditional interstitial spots

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[42] *See Comments of the Children's Media Policy Coalition*, filed MB Docket 08-90 (Sept. 22, 2008) ("CMPC"); *Comments of Commercial Alert*, filed MB docket 08-90 (Sept. 22, 2008), at 28-29 ("Commercial Alert") (supporting CCFC's request to make the embedded ads prohibition in children's programming explicit).

[43] *NAB* at 11.

[44] Children's programming refers to programs originally produced and broadcast primarily for an audience of children 12 years old and younger. 47 C.F.R. § 73.670

[45] Susan Linn and Courtney L. Novosat, *Calories for Sale: Food Marketing to Children in the Twenty-First Century* 615 ANNALS AM. ACAD. POL. & SOC. SCI. 133, 139 (2008).

already aired.[46] Similarly, the 2008 season of *Dancing with the Stars*, the highest rated broadcast program among children ages two to eleven,[47] contained embedded advertisements for Disneyland, *High School Musical*, and The Jonas Brothers.[48] Embedded advertisements for products popular with children run rampant in primetime broadcast television. Over the course of the 2008 primetime broadcast season, children were exposed to 54 embedded advertisements for toys, 167 embedded advertisements for candy and snack food products, and a whopping 2,694 embedded advertisements for soft drinks.[49]

CCFC is concerned that children are not adequately protected from these misleading advertising techniques during the hours when they are likely to be in the audience, and moreover, when families should feel safe watching television together free from unfair commercial manipulation. Consequently, CCFC urges the FCC to examine additional ways to better ensure that children are not exploited by stealth advertising during those hours of broadcast primetime when they are likely to be in the audience. Additionally, any restriction on embedded advertising in broadcast television should apply equally to feature films re-broadcast on television, and to broadcast public television programs.[50]

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[46] Ronald Grover, *American Idol's Ads Infinitum*, BUSINESS WEEK, May 22, 2008, *available at* www.businessweek.com/magazine/content/08_22/b4086038607130.htm?chan=top+news+index_news+%2B+analysis.

[47] *Ratings Report: 14.4 Million Watch Dancing With the Stars Results Show*, REALITY TV FANS, October 15, 2008, www.realitytvfans.com/2008/10/15/ratings-report-144-million-watch-dancing-with-the-stars-results-show.html (citing an ABC press release).

[48] Data from TNS Media Intelligence, www.tns-mi.com/?.pl=TNSMIHome (subscription required) (accessed November 13, 2008).

[49] *Id*.

[50] Because public television broadcasters already adhere to voluntary limitations on the use of embedded advertising, applying an embedded advertising restriction to public television broadcasters should have no effect on their operations.

IV. A Limited Restriction On The Use Of Embedded Advertising Techniques Is Consistent With the First Amendment

As the FCC correctly acknowledged in the Notice, embedded advertising clearly constitutes commercial speech.[51] Accordingly, the constitutionality of a regulation on embedded advertising practices would be subject to the four-part test established by the Supreme Court in *Central Hudson*.[52] First, to receive constitutional protection at all, the speech must concern lawful activity, and not be misleading.[53] If the speech is lawful and not misleading, the government must also demonstrate that its interest in regulating the speech is substantial, that the regulation directly advances the asserted interest, and is not more extensive than necessary to serve that interest.[54]

Media Providers attempt to argue that embedded advertising should not even be considered commercial speech because it does not propose a commercial transaction, which the Supreme Court in *Bolger v. Youngs Drugs Products* determined was "a core notion of commercial speech."[55] This is a disingenuous interpretation of that case because there the Court actually applied a three-part test to determine whether the content at issue was commercial speech: whether the speech (1) is an advertisement, (2) refers to a specific product, and (3) has underlying economic motivation.[56] As to the first prong, the very term "embedded advertising" identifies this speech as an *advertisement*, and Media Providers themselves concede that

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[51] *Notice* at ¶13.

[52] *Central Hudson Gas & Elec. Corp. v. Pub. Service Commission of New York*, 447 U.S. 557, 561 (1980). There the Court determined that commercial speech could be categorized as "expression related solely to the economic interests of the speaker." *Id*. In the case of embedded advertising, where producers and networks accept money and other forms of valuable consideration in exchange for promoting products and brands in their programming, the motive is indisputably profit-driven.

[53] *Id*. at 566.

[54] *Id*.

[55] *Media Providers* at 45 (citing *Bolger v. Youngs Drugs Products*, 463 U.S. 60, 66 (1983)).

[56] *Id*. at 66-67.

"product placement and product integration" is a "subset" of "commercial advertising."[57] Embedded advertising also satisfies the second prong of *Bolger* because it almost always references specific products – for example, the appearance of Coca-Cola beverages on the judges' table on *American Idol*, or the integration of Oreo cookies into the plotline of an episode of *Seventh Heaven*. Finally, the economic motivation behind the practice of embedded advertising is indisputable; indeed, Media Providers argue the purpose of the practice is "to keep advertising revenue robust."[58]

Media Providers also attempt to argue that embedded advertisements should not be regulated as commercial speech and must given full speech protection because they are "inextricably intertwined" with the program content or expressive speech.[59] However, the mere fact that non-commercial and commercial content appear together in the same program does not rise to the level of "inextricably intertwined" within the meaning established in the Supreme Court's commercial speech cases. The Court has found commercial and non-commercial speech to be "inextricably intertwined" only when the law has required that they be so.[60] CCFC is

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[57] *Media Providers* at 3.

[58] *Id.* at 14-15. Additionally, the U.S. Court of Appeals for the Second Circuit has held that the use of a logo or trademark itself could serve to propose a commercial transaction. In *Bad Frog Brewery Inc. v. New York State Liquor Authority*, the court found that the brewery's beer bottle labels were reasonably understood as attempting to convey a source of product, thus proposing a commercial transaction and properly categorized as commercial speech. 134 F.3d 87, 96-97 (2d Cir. 1998).

[59] *Media Providers* at 46 (citing *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 796 (1988)).

[60] Media Providers' reliance on *Riley* is misplaced, as that holding is confined to the unique complexities of charitable solicitations. It is further questionable whether that case even involved a commercial speech issue. The *Riley* Court was not persuaded that professional fundraisers' speech was necessarily commercial simply because they were paid to solicit charitable donations, and declined to part with past precedent in which it had "refused to separate the component parts of charitable solicitations from the fully protected whole." *Riley*, 487 U.S. at 796 (internal citations omitted). The Supreme Court subsequently distinguished *Riley*, finding that "[t]here, of course, the commercial speech (if it was that) was 'inextricably intertwined'

aware of no law or regulation that requires broadcasters to insert products into the plotlines of television shows.[61] Even if the commercial and non-commercial speech are combined, the Supreme Court has held that the mixing of such messages does not bar the regulation of the commercial speech, because "[t]he interest in preventing commercial harms justifies more intensive regulation of commercial speech than non-commercial speech even when they are intermingled."[62] For these reasons, it is clear that limitations on embedded advertisements should be analyzed under the Court's existing commercial speech doctrine.

A. Because It Is Misleading, Embedded Advertising Is Not Entitled To Any First Amendment Protection

Under *Central Hudson*, regulations addressing commercial speech are given less scrutiny than those concerning non-commercial speech.[63] However, as a threshold matter, a regulation is not subject to any First Amendment review if the commercial speech at issue is misleading. [64] Because, as CCFC has demonstrated,[65] embedded advertising is misleading commercial speech, the practice warrants no First Amendment protection.

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because the state law required it to be included." *State University of New York v. Fox*, 492 U.S. 469, 474 (1989).

[61] To the contrary, the Writers Guild asserts that the majority of its members find the "practice of product integration…unacceptable." *Comments of the Writers Guild of America, West*, filed MB docket 08-90 (Sept. 22, 2008) ("Writers Guild"), at 4. The president of the Writers Guild has argued that "[w]hen writers are told we must incorporate a commercial product into the storylines we have written, we cease to be creators. Instead, we run the risk of alienating an audience that expects compelling television, not commercials." *Id.*

[62] *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 426 n.21 (1993).

[63] *Central Hudson*, 447 U.S. at 563 (stating that "the Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression").

[64] *Central Hudson*, 447 U.S. at 566 (finding that "for commercial speech to come within that [First Amendment] provision, it at least must concern lawful activity and not be misleading").

[65] *See supra*, Section I(B).

It is well established that "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising."[66] Not only does the use of embedded advertising in television programming fail to provide any useful consumer information about a product, it is misleading because the very success of embedded advertising is predicated on obscuring the commercial message altogether.[67] The embedded advertising technique seeks to circumvent the natural skepticism and other mental defenses that people tend to employ when consciously confronted with a commercial.[68] Moreover, embedded advertising is even more misleading where children are concerned because the practice of intermingling advertising and program content only further exacerbates most children's cognitive inability to distinguish between commercial and non-commercial messages.[69]

The Supreme Court has determined that commercial speech that concerns unlawful activity or that is misleading is not entitled to any First Amendment protection.[70] The Court has also found it entirely appropriate to place limitations on commercial speech when it does not "serv[e] the individual and societal interest in assuring informed and reliable decisionmaking."[71] In particular, the Court has noted that "when a state regulates commercial messages to protect

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[66] *Central Hudson*, 447 U.S. at 563.

[67] *See supra*, Section II(A)(2).

[68] Relying on a Federal Trade Commission (FTC) letter declining a Commercial Alert request for investigation on the practice of embedded advertising, NAB and the Media Providers claim that embedded advertising is not deceptive, and that the FCC is precluded from taking action on this issue. *See Media Providers* at 54; *NAB* at 6, 23. However, the FTC's letter only addresses whether the objective claims made by advertisers are deceptive under Section 5 of the FTC Act, not whether the practice of obscuring the existence of a commercial is itself misleading. Consequently, the FTC letter does not preclude the FCC from regulating the *practice* of embedded advertising as misleading and contrary to use of the broadcast spectrum consistent with public interest, convenience, or necessity.

[69] *See supra*, Section II(A)(3).

[70] *Central Hudson*, 447 U.S. at 566.

[71] *City of Cincinnati v. Discovery Network*, 507 U.S. at 433 (Blackmun, J. concurring) (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977)).

consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech."[72]

Consistent with this principle, which underlies this very proceeding, Congress and the FCC have attempted to remedy the implicit danger of hidden advertisements through the disclosure requirements mandated under section 317 of the Communications Act.[73] Section 317 is premised on the principle that viewers are entitled to know when they are being advertised to – if sponsorship of embedded products is left undisclosed, viewers may be misled into believing that what they have seen is not an advertisement. Consequently, the very existence of section 317 reflects the government's very real concern with the misleading nature of embedded advertising practices.

CCFC acknowledges that, for adult viewers, effective disclosure may counteract the misleading nature of embedded advertisements. However, CCFC reiterates that disclosure will do little or nothing to remedy the implicitly misleading nature of embedded advertising for children, who can often neither read disclosure statements, nor understand them. Insofar as adults are concerned, CCFC supports the proposal of Commercial Alert, the Writers Guild, and others to improve the effectiveness of sponsorship identification by requiring simultaneous disclosure of embedded advertising.[74] At the same time, CCFC also urges the FCC to take

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[72] *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

[73] *See* 47 U.S.C. § 317.

[74] *Commercial Alert* at 1 (advocating effective, real-time disclosures for embedded advertisements); *Writers Guild* at 3 (advocating for simultaneous disclosure because "artistic integrity, however, requires that viewers be apprised of the commercial influence on the programs that WGAW members write. A real time crawl achieves this goal."); *Comments of Screen Actors Guild,* filed MB Docket No. 08-90, (Sept. 22, 2008), at 4 (urging that "more stringent disclosure rules are critical to ensuring that precise, unambiguous safeguards for

additional action to limit the use of these misleading techniques in broadcast programming during times when large numbers of children are likely to be in the audience.

B. Even If It Is Not Found To Be Misleading, A Limited Restriction On The Use Of Embedded Advertising Techniques Is Clearly Consistent With The First Amendment

Even assuming *arguendo* that embedded advertising techniques are not inherently misleading, at a minimum, such practices are clearly manipulative, particularly where children are concerned. Accordingly, even if embedded advertisements are entitled to some First Amendment protection, a regulation restricting the use of embedded advertisements during broadcast primetime would receive only intermediate scrutiny review under the Supreme Court's commercial speech doctrine.[75] In particular, a limited restriction on embedded advertisements, such as the one proposed by CCFC, would be consistent with the First Amendment because it presents a limited and direct means of furthering the government's substantial interest in protecting children from unfair and unnecessary commercial manipulation.

1. A Limited Restriction Would Directly Advance The Government's Substantial Interest In Protecting Children From Manipulative Advertising Methods

The government's interest in regulating the use of embedded advertising during primetime programming when children are likely to be watching is substantial. First, the government has a substantial interest in preventing the public airwaves from becoming a conduit for unfair advertising techniques and in protecting children from commercial manipulation.[76] Second, the government has a compelling interest generally in protecting the physical and

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consumers are established. The American viewing public is entitled to know who is trying to persuade them...").

[75] *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring) (agreeing with the Court that "this level of intermediate scrutiny is appropriate for a restraint on commercial speech").

[76] *See* 47 U.S.C. § 303a (establishing standards for acceptable children's programming).

psychological well-being of children – an interest which has consistently justified the FCC regulation of content (including advertising) that is inappropriate or harmful when it is likely to be viewed by children.[77]

The FCC has been charged with ensuring that the corporate entities entrusted with using the public airwaves do so in a manner consistent with the public interest, convenience and necessity.[78] Accordingly, from the dawn of broadcast regulation, the FCC and its predecessor the Federal Radio Commission have warned that "advertising must not be of a nature such as to destroy or harm the benefit to which the public is entitled from the proper use of broadcasting."[79] Indeed, the very existence of section 317 indicates that the use of stealthy advertising techniques without meaningful disclosure is inconsistent with a broadcaster's obligation to operate in the public interest. In particular, the FCC has recognized that "an advertiser would have an unfair advantage over listeners if they could not differentiate between the program and the commercial message and were, therefore, unable to take its paid status into consideration in assessing the message."[80]

The duty to serve the public also includes an obligation to serve children, and concerns over manipulative or objectionable content are heightened when children are likely to be in the

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[77] Recently the FCC found a compelling government interest in protecting just over one million child viewers who were subjected to "fleeting expletives" during *The 2003 Billboard Music Awards*. *Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 & Mar. 8, 2005*, FCC 06-166 at ¶18 (Nov. 6, 2006). By contrast, roughly two million two- to eleven-year-olds watch *American Idol* and are regularly bombarded with embedded advertisements. Wayne Friedman, *Nielsen: Networks Hit By Big Product Placement Drops*, MEDIA DAILY NEWS, Sept. 16, 2008, www.mediapost.com/publications/?fa=Articles.san&s=90631&Nid=47302&p=368626.

[78] *See* 47 U.S.C. § 303 and § 303(r) (declaring the FCC's powers to ensure that radio and broadcast stations comply with their public interest obligations).

[79] 2 F.R.C. Ann. Rep. 20 (1928).

[80] *1974 Children's Television Report and Policy Statement,* 50 FCC 32d 1, ¶ 46 (1974) ("1974 Policy Statement").

audience.[81] The courts have consistently found a "compelling interest in protecting the physical and psychological well-being of minors."[82] For example, the government has a compelling interest in protecting children from indecent material, even when such material is not obscene by adult standards.[83] Similarly, the government has an interest in shielding children from advertising messages covertly placed in programming children will likely watch. In particular, the FCC has determined that stealth advertising techniques, like those employed in embedded advertising, are inconsistent with the public interest and should be regulated to prevent broadcasters from allowing advertisers to "prey upon or exploit the peculiar vulnerabilities of immature judgment or unsophistication" of the child audience.[84] As a result, the FCC, as well as Congress, have taken measures to ensure that, at least during children's programming, children's "unique vulnerability to commercial persuasion," is not exploited by over-commercialization and sophisticated advertising methods.[85]

The FCC has already acknowledged that embedded advertisements are likely to confuse children by interweaving program content and commercial matter.[86] Consequently, a restriction on embedded advertisements during the hours of broadcast primetime when children are likely to be watching would more effectively advance the government's interest in ensuring the airwaves are used consistent with the public interest, and in protecting children from exploitive advertising practices.

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[81] *See 1974 Policy Statement* at ¶ 15 (affirming that broadcasters have a public interest obligation to serve children).

[82] *See, e.g., Sable Comm. of Cal., Inc., v. FCC*, 492 U.S. 115, 126 (1989); *Denver Area Educational Telecomm Consortium, Inc., v. FCC*, 518 U.S. 727, 754 (1996).

[83] *FCC v. Pacifica Foundation*, 438 U.S. 726, 730-32 (1978) (upholding restrictions on generally available programming on the basis of inappropriateness for children, specifically citing the need to provide special considerations for broadcast programs where children were concerned).

[84] *1974 Policy Statement,* Separate Statement of Commissioner Glen. O. Robinson.

[85] H.R. REP. No. 101-385, at 6 (1989).

[86] *CTA Implementation Order*, 6 FCC Rcd 2111, ¶ 44 (1991).

2. A Limited Restriction Is Narrowly Tailored And No More Extensive Than Necessary To Protect Children From Manipulative Advertising Methods

CCFC proposes limiting the use of embedded advertising techniques during those hours of broadcast primetime when children are likely to be in the audience. CCFC is not asking the Commission to ban all advertising, or even to ban all embedded advertisements. As a result, such a limited measure, if adopted by the FCC, would be "narrowly tailored to achieve the desired objective"[87] of protecting children from manipulative advertising methods when they are likely to be in the viewing audience, and would be no "more extensive than necessary."[88]

CCFC's proposal is narrowly tailored to target the dangers of stealth advertising, but takes care not to impinge on the creative content choices of writers and producers. CCFC supports the comments of the Writers Guild and recognizes that there are times when, for legitimate artistic reasons, writers and producers may choose to feature a specific brand or product.[89] Accordingly, CCFC's proposal would only apply to the *quid pro quo* sponsorship arrangements that trigger sponsorship identification under the current rules. CCFC's proposed restriction would not disturb creative decisions regarding unsponsored use of brands.

Nor would such a restriction impermissibly infringe on broadcasters' business models. CCFC is quite aware of broadcasters' reliance on advertising income. However the limited additional restriction proposed would not affect normal advertising revenue streams or threaten "the economic base [or] incentive" to create broadcast programming.[90] CCFC's proposal does not interfere with the use of traditional interstitial spots aired during primetime or any other time

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[87] *Fox*, 492 U.S. at 480.

[88] *Central Hudson*, 447 U.S. at 566.

[89] CCFC is concerned with the misleading nature of undisclosed commercial transactions. Therefore, any legitimate creative use of branding, deemed necessary by the writers and not sponsored by the featured brand, would not be affected by the proposed restriction.

[90] *1974 Policy Statement* at ¶ 35.

of the day. Nor would CCFC's proposal limit the use of embedded advertisements in general audience programming aired during the vast remaining portion of the day. CCFC simply proposes a limited window of time during primetime broadcast programming where children or families can watch television together free of objectionable or manipulative content.

This limited additional restriction on embedded advertising techniques would be substantially less burdensome than existing time-channeling policies for the broadcast of other types of speech that are otherwise entitled to full First Amendment protection. For example, for thirty years the courts have upheld the constitutionality of time-channeling restrictions on the broadcast of indecent speech in order to protect children from exposure to objectionable content.[91] Accordingly, a far more limited time-channeling rule against the use of embedded advertising techniques – which enjoy substantially less First Amendment protection than the indecent speech – would be clearly constitutionally acceptable. Moreover, a limitation on embedded advertising during hours when children are likely to be watching would not "reduce the adult population . . . to [watching] only what is fit for children."[92] On the contrary, only the use of embedded advertising techniques would be restricted during this modest time period,

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[91] *Pacifica Foundation*, 438 U.S. 726 (finding a regulation to protect children from indecent broadcast material to be constitutional); *see also*, *Action for Children's Television v. FCC*, 58 F.3d 654, 655 (D.C. Cir. 1995) (upholding a decision to restrict broadcast programming during certain hours to continue the government's interest in protecting children).

[92] *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957). Media Providers rely on *Butler* to suggest that any increased regulation of embedded advertising "would be treating adults as if they were children." *Media Providers* at 34. Of course, the blanket assertion that *any* additional regulation of embedded advertising is impermissible is ludicrous. In any event, *Butler* is not controlling here. In *Butler*, the statute at issue prohibited making a book available to the general public if it was deemed to have a potentially harmful influence on young people. *Butler*, 352 U.S. 380. However, CCFC's proposed limitation on embedded advertising is distinguishable from the statutory prohibition in *Butler*. That statute shielded entire works from the general public if they would be unsuitable for youth, whereas CCFC's proposal does not affect adults' access to general audience programs, it merely limits times when broadcasters can employ certain advertising techniques.

leaving all creative and non-commercial content intact. Adults would continue to have full access to general audience programming.

Finally, restricting the use of embedded ads during the hours of primetime when children are likely to be watching is the least restrictive means the FCC can employ while still adequately protecting children. As CCFC has demonstrated, the sponsorship disclosures required under section 317 are unlikely to protect children from being confused when commercials are integrated into the plotlines of their favorite shows, or manipulated when products are touted by the characters and personalities they trust. Many children are too young to read such disclosures, and even those that can are unlikely to understand the significance of sponsorship identification. Consequently, though disclosures may be effective for adults, they are not an adequate less-restrictive alternative because they do not protect children, who are most at risk from the harms associated with embedded advertising techniques.

CONCLUSION

CCFC urges the Commission to promptly adopt an explicit ban on the use of embedded advertising in all children's programs. CCFC also urges the FCC to explore ways to protect children from embedded advertising outside of the strict definition of children's programming by limiting the use of embedded advertising in primetime broadcast programming during those hours when they are likely to be in the audience.

Respectfully Submitted,

_____/s/_____
Victoria F. Phillips, Esq.
Coriell Wright, Esq.

Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, DC 20001
(202) 662-9535

Counsel for the Campaign for a
Commercial-Free Childhood

Claire Magee
Deanna Pisoni
Elizabeth Serio

Law Students
Georgetown University Law Center

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